NO. 33529

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

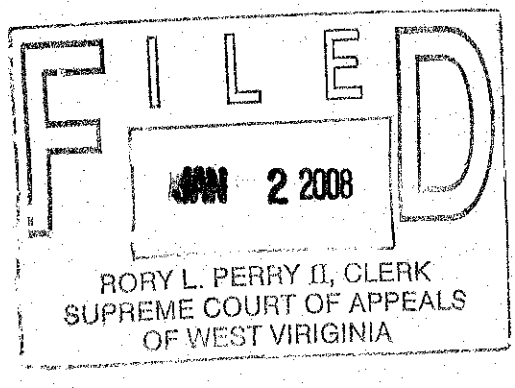
STATE OF WEST VIRGINIA,

Appellee,

v.

JOSHUA C. WEARS,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW[1]

Appellant Joshua C. Wears (hereafter "Appellant") entered a conditional guilty plea to one count of Third Degree Sexual Assault pursuant to a plea agreement struck with the State on October 30, 2006.[2] (R. at 174.) By order entered December 28, 2006, the Circuit Court of Putnam

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[1]It is counsel for the Appellee's understanding that the Appellant has filed a post-petition motion to supplement the record. As counsel for the Appellant has not served a copy of this motion upon the Appellee, Appellee's counsel reserves the right to respond to this motion.

[2]The Appellant preserved two issues for appeal: (1) The trial court's denial of the Defendant's Motion to Suppress the statement given to Putnam County Sheriff Detective Shawn Johnson; and (2) the trial court's ruling precluding the Defendant from presenting evidence of the alleged victim B.D.'s alleged relationship with an individual known as [J.L.] for the purpose of proving the alleged victim's motive to falsely accuse the Defendant of the offenses set forth in the indictment. *See* W. Va. R. Crim. P. 11(a)(2).

County (Eagloski, J.) sentenced the Appellant to not less than one nor more than five years in the State penitentiary with credit for 216 days time served.[3] (R. at 192.) The Court noted Appellant's objection to the credit-for-time served part of its ruling. Appellant appeals this ruling and the trial court's decision excluding evidence of any prior sexual conduct by the victim under the State's rape shield statute. *See* W. Va. Code § 61-8B-11.

II.

STATEMENT OF FACTS

The Appellant pled guilty to sexually assaulting thirteen-year-old B.D.[4] on March 28, 2005. Originally, Appellant was charged in a seven count indictment for two counts of Second Degree Sexual Assault, two counts of Third Degree Sexual Assault, one count of Sexual Abuse in the First

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On August 17, 2007, the Appellant filed an Motion to Supplement the Record with Newly Discovered Evidence. Specifically, a letter dated almost three months before the Appellant entered his guilty plea from Putnam County Prosecuting Attorney Larry Frye, informing him that the victim had provided a tape recorded statement Metro Drug Unit Detective Jack Luikart regarding an ongoing criminal investigation of an unrelated third-party T.J. The juvenile victim was a potential state's witness in this unrelated matter, and was promised immunity by another Putnam County Prosecutor for her testimony. (R. at 175; Respondent's Motion to Supplement the Record with Newly Discovered Evidence.)

This Court reserved judgment on this matter until the "Putnam County Prosecuting Attorney, on behalf of the State of West Virginia" responded to the motion. (Court's Order dated November 20, 2007.)

[3]On August 29, 2007, Appellant's counsel filed a Motion to Supplement the Record in which he acknowledged that the trial court had granted him additional credit for time served between November 25, 2005 (the date of his initial appearance), and December 19, 2005 (the date bond was posted), by order entered August 9, 2007. The Appellant is now claiming he is entitled to 66 additional days of credit.

[4]Except for the Appellant, the Appellee refers to all parties by their initials.

Degree, one count of Sexual Abuse in the Third Degree, and one count of Battery. (R. at 1-2.) As part of his plea agreement the State dismissed Counts 1, 2, 4, 5, 6, and 7.

This attack occurred while the Appellant was on bond after his October 2004 arrest for sexual assaulting thirteen-year-old E.M. On June 15, 2005, the Appellant pled guilty to domestic battery in that matter and was sentenced to a year.

The allegations came to light when B.D.'s mother found small reddish bruises, commonly referred to as "hickeys" on B.D.'s upper body. Upon further questioning B.D. alleged that the Appellant and his co-defendant held her down and repeatedly inserted their fingers inside her vagina while sucking on her body thus causing the hickeys.

A Putnam County Grand Jury returned a true bill of indictment on July 13, 2005. The trial court appointed present counsel on July 19, 2005.[5] On September 19, 2005, over the objections of defense counsel, the Circuit Court of Putnam County (Spaulding, J.) dismissed the indictment at the behest of the State due to defective language in Counts 1, 2, and 3.[6]

Although the present charges against him were not pending the Appellant remained incarcerated because of his June 15 conviction. On November 17, 2005, a Putnam County Grand Jury returned a true bill of indictment again charging the Appellant with two counts Second Degree Sexual Assault, two counts of Third Degree Sexual Assault, one count of Third Degree Sexual Abuse, one count of First Degree Sexual Abuse, and one count of Battery. (R. at 1-2.)

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[5]Counsel also represented him on his prior charge.

[6]The State had included the term "sexual intercourse" when the facts suggested that the Appellant, along with his co-defendant L.S. held B.D. down and inserted their fingers inside her vagina suggesting "sexual intrusion."

The trial court re-appointed present counsel by order entered November 28, 2005.[7] (R. at 20.) Appellant was arraigned on December 5, 2005. The trial court set bond at $37,500 upon condition that he appear for a pre-trial hearing on February 9, 2006. (R. at 4, 29-30.) The Appellant posted bond on December 19, 2005, and was released from custody. (R. at 7.)

The Appellant failed to appear for an April 13, 2006, pre-trial hearing. Consequently, the trial court issued a bench warrant, and an order of bond forfeiture.[8] (R. at 86.) It was later discovered that the Appellant had fled to Taylorsville, North Carolina, where he was apprehended on or about May 22, 2006. (R. at 92.) At a June 8, 2006, status hearing the trial court re-set Appellant 's bond at $100,000. (R. at 102-103.) Appellant never posted this bond and has remained continuously incarcerated.

III.

ARGUMENT

A. APPELLANT WAS NOT ENTITLED TO CREDIT WHILE INCARCERATED ON ANOTHER CHARGE.

1. The Standard of Review.

In *State v. McClain*, 211 W. Va. 61, 64, 561 S.E.2d 783, 786 (2002), this Court held:

> As a general rule, the sentence imposed by a trial court is not subject to appellate review. However, in cases . . . in which it is alleged that a sentencing court has imposed a penalty beyond the statutory limits for impermissible reason, appellate review is warranted. Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Once an appropriate basis for review is established, this Court applies a three-prong standard of review to issues involving motions made pursuant to Rule 35 of the West Virginia Rules of Criminal Procedure. "We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are

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[7]The same counsel represented the Appellant while the prior indictment was pending.

[8]Appellant's surety requested a bail piece on May 12, 2006. (R. at 89.)

reviewed under a clearly erroneous standard; and questions of law and interpretations of statutes and rules are subject to de novo review." Syl.pt. 1, in part, *State v. Head,* 198 W. Va. 298, 480 S.E.2d 507 (1996).

2. Discussion.

Appellant supports his position with the following argument:

> In the case at hand, the Defendant was in jail, pretrial, where the underlying offense is bailable beginning the date of his arrest on April 8, 2005. If this Court's ruling in this matter is allowed to stand, the State of West Virginia could arrest a defendant . . ., bind them over for grand jury presentment, indict them with an erroneous indictment, dismiss the indictment over the defendant's objection, and thereby deprive the defendant of all credit for time served prior to the dismissal by the State.

(Appellant's Brief at 12-13.)

The Appellant's position is both factually and legally wrong. The trial court did not deny the Appellant a single day of pre-trial credit. Every day spent in jail *while the charges were pending* was credited. The trial court did not afford him credit for time served on another charge.

Appellant argues that he should not suffer because of the prosecution's sloppy draftsmanship. Although this is true, he should not benefit from it either. The Appellant, a recidivist of the worst kind, was in jail on an unrelated charge when the State dismissed the first indictment. If he were not serving time for this prior charge he might have been released; since he was, he remained incarcerated. His incarceration had nothing to do with the case at bar. He should not be rewarded for his habitual criminal behavior. *C.f. Echard v. Holland*, 177 W. Va. 138, 144, 351 S.E.2d 51, 57 (1986) (incarcerated defendant not entitled to credit for time served for offense committed after imposition of sentence on prior crime.). *See also Miller v. Luff*, 175 W. Va. 150, 332 S.E.2d 111 (1985).

Petitioner's citation to *Martin v. Leverette,* 161 W. Va. 547, 244 S.E.2d 39 (1978), is unconvincing. In Syllabus Point 1 of *Martin*, this Court held that "[t]he Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial, shall be credited on an indeterminate sentence where the underlying offense is bailable." *Martin*, 161 W. Va. at 547, 244 S.E.2d at 39. However, this rule is inapplicable to cases where, as here, a criminal defendant is already incarcerated and serving a sentence for another offense. *State v. Williams*, 215 W. Va. 201, 208, 599 S.E.2d 624, 631 (2004) (*per curiam*).

B. BECAUSE THE APPELLANT NEVER OFFERED AN ADEQUATE PROFFER, THE TRIAL COURT'S DECISION TO EXCLUDE EVIDENCE OF THE VICTIM'S PRIOR SEXUAL CONDUCT WAS CORRECT.

1. The Standard of Review.

This Court has set forth a three-pronged balancing test a trial court must use when addressing the admissibility of evidence of a victim's prior sexual behavior with a third party: (1) whether the testimony is relevant; (2) whether its probative value was outweighed by its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. *State v. Guthrie*, 205 W. Va. 326, 330, 518 S.E.2d 83, 87 (1999). The trial court's decision will only be reversed upon proof of a clear abuse of discretion. *Id.*

A defendant seeking to introduce evidence of a victim's sexual history must offer an evidentiary proffer which affords that trial court a meaningful opportunity to balance the interests of the state, as embodied in the rape shield statute, against the interests of the defendant. A proffer requiring the court to speculate is insufficient. *C.f. Quinn v. Haynes*, 234 F.3d 837, 850 (4th Cir. 2000) ("Upon review of the State's legitimate interests underlying implementation of its rape shield

law in [*State v. Quinn*, 200 W. Va. 432, 490 S.E.2d 34 (1997)], we do not believe that West Virginia's rejection of simple denial testimony as proof of falsity is arbitrary of disproportionate to the interests the rape shield law was designed to serve.").

2. Discussion.

Although a criminal defendant must be afforded a "meaningful opportunity to present a complete defense," *see Crane v. Kentucky*, 476 U.S. 683, 690 (1986), the right is not unlimited. A defendant does not have an "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Id.*

Nor is a defendant's right to confront witnesses absolute. This interest may bow to competing and legitimate state interests. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). *See also Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)(confrontation clause guarantees "opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish"). Trial courts "retain wide latitude . . . to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

West Virginia's rape shield statute provides, in part:

> In any prosecution under this article evidence of specific instances of the victim's sexual conduct with persons other than the defendant . . . shall not be admissible.

W. Va. Code § 61-8B-11(b).

Both this Court and the United States Supreme Court have recognized a limited exception to this prohibition. State rules of evidence conflicting with constitutional guarantees "may not be

applied mechanistically to defeat the ends of justice." *Rock v. Arkansas*, 483 U.S. 44, 55 (1987). *See also Holmes v. South Carolina*, 547 U.S. 319 (2006) (holding that state evidentiary rule excluding evidence of third-party guilt based on strength of state's case denied the defendant due process); *Michigan v. Lucas*, 500 U.S. 145, 151 (1991)(defendant's right to confront witnesses under state rape shield statute may not be limited by state interests which are "*arbitrary or disproportionate* to the purposes they are designed to serve.") (internal quotation marks omitted) (emphasis added); Syl. pt. 2 *State v. Guthrie*, 205 W. Va. at 330, 518 S.E.2d at 87.

An evidentiary rule is arbitrary or disproportionate to it purposes if it interferes with the "weighty interest of the accused." *Rock*, 483 U.S. at 58. The analysis is fact-intensive, made on a case-by-case basis. *LaJoie v. Thompson*, 217 F.3d 663, 669 (9th Cir. 2000) (and cases cited therein).

This Court set forth a three-pronged balancing test a trial court must apply when addressing the admissibility of a victim's past sexual conduct with a third party: (1) whether the testimony is relevant; (2) whether its probative value was outweighed by its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. *Guthrie*, 205 W. Va. at 330, 518 S.E.2d at 87.

The Appellant claimed that he had not assaulted B.D. and had not caused the contusions on her upper body. (7/27/06 Hr'g at 9.) To support his defense the Appellant offered two reasons why the trial court should have permitted him to cross-examine the victim about her past sexual conduct with a third party: (1) because she had previously lied to two investigating officers about a contemporaneous sexual relationship with this third party evidence of this relationship was

admissible to impeach her credibility;[9] and (2) given her parent's opposition to her relationship with this third party she was motivated to falsely accuse the Appellant in order to cover up the illicit relationship.[10] (7/27/06 Hr'g at 13-16.)

Appellant's counsel filed a "Motion for Admission of Possible Sexual Conduct of the Alleged Victim" before the trial court dismissed the first indictment. He re-filed this same motion on April 7, 2005. (R. at 69.) The trial court convened an evidentiary hearing on Appellant's motion on July 27, 2006. By order entered August 11 the court ruled that the Appellant's proffer was so vague any sort of meaningful balancing test would be impossible. The court denied Appellant's motion but ruled that Appellant could re-raise the issue upon production of additional evidence. (R. at 123; 7/27/06 Hr'g at 16, 43.)

The Appellant submitted a Motion for Reconsideration on September 19, 2006. (R. at 128.) He appended an affidavit quoting an unnamed witness[11] who claimed that she had seen the victim and J.L. at her home days before the incident in question and that this witness "presumed [the victim and J.L.] had a sexual encounter as they had on multiple weekends in the past." (R. at 129.) The witness also claimed "direct visual knowledge of a sexual relationship between [the third party] and the alleged victim." *Id.* The affidavit is signed by defense counsel, none of the unnamed witnesses statements were taken under oath. Counsel is merely swearing that he heard them.

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[9]On April 4, 2006, then Prosecuting Attorney Daniel Holstein notified Appellant's counsel regarding the victim's prior denials. (R. at 76-77.)

[10]Apart from counsel's own vouching, there is no evidence to support this allegation. More importantly, there is no reason why the victim would accuse the Appellant of sexually assaulting her when all she needed was an alternative explanation for her hickeys.

[11]During a October 26, 2006, pre-trial hearing he identified the witness as a she. (10/26/06 Hr'g at 14.)

The Appellant's affidavit is virtually meaningless. The witness remained unnamed. Since defense counsel, not the witness, did not sign the sworn statement it consists of inadmissible hearsay. There is no proof of this unnamed witness's competency, opportunity to observe, or ability to perceive. Since counsel for the Appellant failed to produce this witness, the State had no opportunity to challenge her credibility, or potential biases. The witness presumes a sexual relationship with the third party, and attributes hickeys to this relationship. Although the witness claims "direct visual knowledge" of this alleged sexual relationship, she offers no corroborating proof as to the nature of this knowledge or how it was obtained. The witness also speculates that the victim has been keeping this relationship a secret from her parents. The witness fails to mention how she knows this.

The affidavit is poorly drafted, vague, and rife with speculation, hearsay and innuendo. There is not an ounce of concrete evidence to buttress its allegations. Indeed, it reads more like a cheap gossip rag than a court filing. The trial court had no reason to credit a single word contained in the affidavit. Innuendo, hearsay, and gossip have no weight. Thus, the trial court had nothing to balance.

In *United States v. Sanchez*, 44 M.J. 174, 177-178 (United States Armed Forces, 1996), the United States Court of Appeals for the Armed Forces addressed the problems inherent in vague proffers:

> As to the procedural rules, Mil. R. Evid. 412 (c)(2) requires an offer of proof, commonly called a proffer. If this proffer contains evidence falling under one of the exceptions, the military judge shall conduct a hearing . . . to determine if such evidence is admissible. The reason for the hearing . . . , is to serve as a check on questionable proffers in order to protect victims and, if the evidence is eventually ruled inadmissible, to have a record for appeal. However where the proffer is insufficient on its face, there is no requirement for a hearing. to require a hearing when the proffer has not met the threshold requirements for a hearing would

> undermine the rationale for Mil. R. Evid. 412 (a) and (b) - to protect victims from humiliating, embarrassing, and harassing questions.

(Quotations and citations omitted.)

The Appellant also intended to call two law enforcement officers, Detective Shawn Johnson and State Trooper Gonzalez, and former prosecutor Dan Holstein. These law enforcement officers would testify that the victim denied having a sexual relationship with J.L. twice. The previous prosecutor, Dan Holstein, would testify that she admitted to the relationship during a pre-trial interview. None of these witnesses corroborated Appellant's nameless witness's allegation that J.L. was responsible for the victim's hickeys or that he was with her at the time of the alleged assault. (10/26/06 Hr'g. at 31.)

After reviewing the victim's confidential mental health records *in camera*, the trial court provided them to both the Appellant and the State. (10/26/06 Hr'g at 53-54.) The records included a victim statement asserting that she was molested by two people in March of the previous year. (10/26/06 Hr'g at 54.) Even if she had been carrying on a consensual relationship with J.L., it is doubtful that she would characterize it as molestation.

On the issue of bias, Appellant's counsel did not prove, nor could he even suggest, that the victim had kept her alleged relationship with J.L. a secret because she did not want her parents to know:

> MR. PEYTON: Yes. About [J.L.]. Now I don't know what [the victim's] parents will say if questions are posed in regard to that relationship [between the victim and J.L.]. Obviously, if they said they knew it was going on and consented to it, then I don't have that argument with them any longer. I don't think that they will

THE COURT: Well, the problem is I'm going to have to exclude it a this point because I'm supposed to have a hearing in camera, which was set for here today. All I have is argument. I have no witnesses to take evidence of other than I have a letter, which the Court will take record of as truth, that Mr. Holstein said this. But other than that statement that Mr. Holstein represented to defense counsel that the child lied, I don't have – everything else is just speculation of argument of what it is. Without something more – I do have the affidavit, but that doesn't go to the issue of Mr. Wears and the issue of J.L. and the victim's liaison as it relates to what this alleged motive for lying would be. That would be purely speculation.

So at this point I'm going to exclude that matter unless it can be shown to the Court otherwise.

(10/26/06 Hr'g at 49-50.)

The Appellant has not proven that the trial court abused its discretion. Although it is permissible to establish the need for this evidence by proffer, Appellant's proffer was woefully inadequate. He could not prove that the evidence in question, clearly prohibited by the State's rape shield statute, was relevant. The evidence does not exclude the Appellant, it merely suggests that a third party may have been responsible for some of the victim's hickeys. The evidence does not support an alibi, or prove that J.L. was present on the day in question.

More importantly, there is no evidence of motive, the lynchpin of Appellant's defense. As stated above, the victim's prior relationship, even if true, had nothing to do with the Appellant's guilt or innocence unless it suggested that the victim had a motive to lie. Without this crucial piece of evidence the Appellant's proffer is a bridge to nowhere. Rejecting the Appellant's offer of proof was well within the bounds of reason.

IV.

CONCLUSION

For all of the reasons set forth in this brief and apparent on the face of the record, the judgment of the Circuit Court of Putnam County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *"Brief of Appellee State of West Virginia"* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 2nd day of January, 2008, addressed as follows:

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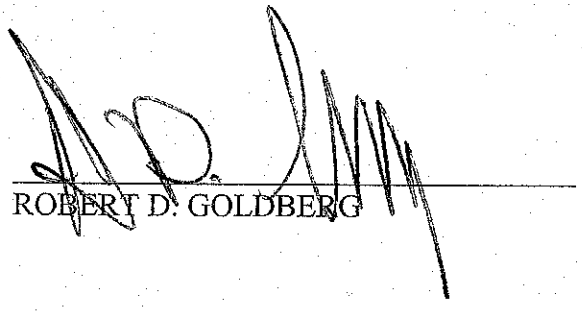

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